

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 3, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2017AP546

Cir. Ct. No. 1994CF114

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ARTHUR FOSTER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Pierce County:
JAMES J. DUVALL, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Arthur Foster, pro se, appeals an order denying his postconviction motion in which he requested a resentencing hearing after the circuit court amended the judgment of conviction to set a parole eligibility date. Foster contends the circuit court was required to conduct a new sentencing hearing, giving him the right to be present under WIS. STAT. § 971.04(1)(g) (2015-16).¹ We reject that argument and affirm the order.

¶2 In 1995, Foster entered *Alford*² pleas to two counts of first-degree intentional homicide. The circuit court imposed concurrent life sentences with parole eligibility in 2050. In 2015, the Department of Corrections asked the court to clarify the specific parole eligibility date in 2050. The circuit court amended the judgment of conviction to reflect a parole eligibility date of January 1, 2050. Foster then filed a postconviction motion, arguing that the court’s failure in 1995 to set a specific parole eligibility date compelled the court now to resentence him at a hearing that Foster would be allowed to attend. The circuit court denied the motion, and Foster appeals.

¶3 Under WIS. STAT. § 973.014(1) (1993-94), the original sentencing court was required to choose one of two options: “(a) the person is eligible for parole under s. 304.06(1)” or “(b) the person is eligible for parole on a date set by the court.” The sentencing court chose the second option, but it set only the year for Foster’s parole eligibility, not the specific date. Contrary to Foster’s argument, that error does not require a new sentencing hearing. Foster cites *State v.*

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

² Referring to *North Carolina v. Alford*, 400 U.S. 25 (1970).

Setagord, 187 Wis. 2d 340, 523 N.W.2d 124 (Ct. App. 1994), in support of his argument that he is entitled to a new hearing. In *Setagord*, the sentencing court did not choose either of the two available statutory options. Therefore, remand for a proper sentencing hearing was required. Here, the court clearly chose the second option. Its failure to provide a specific date within the 2050 calendar year constitutes a merely technical error and does not render the sentence “illegal” or “invalid.” The circuit court has inherent authority to amend the judgment of conviction to remedy the technical defect in the initial judgment. See *State v. Dowdy*, 2010 WI App 158, ¶25, 330 Wis. 2d 444, 792 N.W.2d 230.

¶4 Because amending the judgment to clarify the parole eligibility date does not constitute imposition of a new sentence, Foster was not entitled to be present at a hearing under WIS. STAT. § 971.04(1). *State v. Vennemann*, 180 Wis. 2d 81, 93, 508 N.W.2d 404 (1993). In addition, even if Foster had the right to be present, correcting the initial judgment *in absentia* would constitute a harmless error. Harmless error tests apply to a defendant’s right to be present. See *State v. Stenseth*, 2003 WI App 198, ¶¶19-20, 266 Wis. 2d 959, 669 N.W.2d 776. Because the circuit court set the earliest possible parole eligibility date in 2050, Foster could not have obtained a more favorable result had he been present.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

